MAR 13 1992
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No. 91-1270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, *et al.*,
Appellants,

vs.

LOUIS TERRAZAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' SUPPLEMENT TO JURISDICTIONAL STATEMENT AND OPPOSITION TO MOTION TO AFFIRM

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

RENEA HICKS*
Special Assistant Attorney General
**Counsel of Record*

JAVIER P. GUAJARDO
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085
Attorneys for Appellants

OF COUNSEL:
SAMUEL ISSACHAROFF
727 E. 26th Street
Austin, Texas 78705
(512) 471-5151

March 13, 1992

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APPELLANTS' SUPPLEMENT TO JURISDICTIONAL STATEMENT AND OPPOSITION TO MOTION TO AFFIRM

Pursuant to the Court's Rules 18.8 and 18.9, the Governor, Attorney General, and Secretary of State of Texas supplement their Jurisdictional Statement and respond in opposition to the appellees' Motion to Affirm:

Recent Events

Two events since the filing of the Jurisdictional Statement further enliven this case and heighten the importance of the questions presented in this appeal. These same events dramatically illustrate the invalidity of the lower court's jurisdictional usurpation of section 5 powers from the administrative and judicial forums -- the Department of Justice ("DOJ") and the United States District Court for the District of Columbia -- assigned section 5 responsibilities by the Voting Rights Act ("Act").

On February 25, 1992, a three-judge panel of the United States District Court for the District of Columbia denied the state's motion for partial summary judgment in the pending section 5 case of *Texas v. United States*, No. 91-2383. *See* Motion to Dismiss, App. C.

On March 9, 1992, DOJ issued a section 5 letter, objecting to S.B. 1, the state's legislatively-enacted Senate redistricting plan. *See* Appendix to this Supplement and Response in Opposition. The only basis for DOJ's objection is the *Terrazas* district court's globally-stated preliminary determination that S.B. 1 violates section 2.[1]

Both the court in *Texas v. United States* and the DOJ in its March 9th letter treat the district court order

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[1] DOJ's rationale is a matter of choice, not compulsion. *See City of Richmond v. United States*, 422 U.S. 358, 373-74 (1975) (DOJ not bound by resolution of section 5 issues in cases to which it was not a party).

challenged in this appeal ("*Terrazas* Senate plan") as altering *for now* the status quo insofar as section 5 review is concerned; both also recognize that subsequent action by this Court may alter the section 5 status quo which must guide them in exercising their jurisdictional responsibilities under the Act.

Relationship between Recent Events and Appellate Issues

The result has been an inversion of the statutory scheme under section 5 of the Act. Instead of the specialized mechanism of review by DOJ and the D.C. district court established in the Act, *McDaniel v. Sanchez*, 452 U.S. 130, 150-51 (1981), the exclusive source of review has become a local three-judge court. It is apparent that both the *Texas v. United States* court and DOJ felt displaced by the unreversed existence of the *Terrazas* Senate plan and that neither was willing to act in anticipation of what this Court might rule on appeal.

The inversion of authority and the resulting paralysis quickens the section 5 jurisdictional issue raised here, investing it with more force and importance. Painted into a corner by the district court's *Terrazas* Senate plan, the specialized section 5 forums in the District of Columbia refuse to exercise the independent judgment which the Act established them to exercise.

This result reveals fundamental confusion and conflict in the federal courts about the proper role of section 5 review. Whereas this Court has repeatedly cautioned that section 5 is not a license to cast aside the policy determinations of covered jurisdictions, even where statutory infirmities are properly found to exist, *see Upham v. Seamon*, 456 U.S. 37 (1982), the use of the *Terrazas* court's unfounded plan serves to preclude all consideration of the policy choices of the state. Both DOJ and the D.C. district court have given to the *Terrazas* plan that binding deference which this Court sought to preserve for the legitimate policy choices of sovereign

states. This circumstance brings this case into square conflict with the recent ruling of the Fifth Circuit which properly refused to allow interim actions by local federal courts to serve as benchmarks that would substitute for the policy choices of covered jurisdictions for purposes of section 5 review. *See White v. City of Belzoni*, 854 F.2d 75, 76 (5th Cir. 1988) (finding no authority for the claim that a court-ordered interim plan "must serve as the benchmark for future plans").

Thus, in a fundamental perversion of the Act's section 5 scheme, the *Terrazas* court, rushing to fill a non-existent vacuum, has constituted itself the only section 5 forum available to the state. It has impermissibly wedged its plan between the previously implemented (that is, benchmark) plan and the state plan precleared on November 18, 1991.[2] This consequence, of course, forms the very basis of the state's appeal and its argument that the challenged district court order must be reversed for lack of jurisdiction.

The perversion of the statutory scheme is evident from the appellees' motion in which the argument is made that S.B. 1 is retrogressive when compared to the *Terrazas* Senate plan. Motion at 21. The determination whether S.B. 1 is retrogressive is statutorily entrusted to one forum and one forum only, that being the reviewing authorities in the District of Columbia. *Hathorn v. Lovorn*, 457 U.S. 255, 267 (1982). Yet, appellees would have this Court engage in this type of comparative review on appeal from a court that was statutorily without authority to

[2] DOJ's preclearance was reconfirmed when January 14, 1992, passed without DOJ reversing its November 18th decision. January 14th -- DOJ's legal deadline for objecting, *see* Motion to Affirm, App. B-1 -- was well *after* the state had begun compulsory implementation of the *Terrazas* plan and five days *after* the state had resubmitted S.B. 1 as a precautionary measure.

engage in any substantive determinations whatever under section 5.

The continued existence of the *Terrazas* Senate plan directly contradicts the combined principles of *Morris v. Gressette*, 432 U.S. 491 (1977), and *City of Lockhart v. United States*, 460 U.S. 129, 132-33 & n.8 (1983). The district court, in ordering implementation of the *Terrazas* Senate plan, used state law to override a DOJ grant of preclearance, an action which *Gressette* and *Lockhart* together forbid; it inverted the bedrock federalism-based principle of legislative deference, *see McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981), by engaging in a remarkably strenuous effort to belittle, instead of deferring to, the state's legislative effort.

It is no surprise that this indiscriminate trampling of governing doctrines of voting rights law has ended with the effective overthrow of section 5's jurisdictional grant to District of Columbia forums. This case has seen the collapse of the entire structure of the Voting Rights Act, the inevitable consequence of the district court's demolition of the Act's foundations. At every turn, the district court avoided the principles of restraint which this Court has used to bound the dangerously amorphous doctrine of vote dilution:

- The district court showed no deference to the state's legislative choices. Disregarding the dictates of *Upham v. Seamon*, *supra*, it honored not a single state policy choice expressed by S.B. 1;

- The district court gave the state legislature no real opportunity to submit a remedial plan and completely ignored the rulings of *Burns v. Richardson*, 384 U.S. 73 (1966), *Wise v. Lipscomb*, 437 U.S. 535 (1978), and *McDaniel v. Sanchez*, *supra*, 452 U.S. at 152 n.34, by disregarding S.B. 1

as a remedial plan because its state law effective date had technically not yet arrived;

- In elbowing aside the state's legislative choices, the district court also elbowed aside the choice -- that is, S.B. 1 -- of those historically representing minority interests in Texas and largely adopted the choice of interests who had no testimony by minority plaintiffs;

- The final irony, this appeal's core, is that the local section 2 forum has become the section 5 forum, while the section 5 forums in D.C. have become section 2 forums.

The recent events only serve to highlight the validity of the state's original position. Things have come full circle. It is critical that the statutory balance be reestablished through restoration to the administrative and judicial forums in the District of Columbia of their section 5 authority -- preempted by the local district court -- to exercise specialized, independent judgment.

CONCLUSION

This appeal is about the importance of jurisdictional bounds on federal courts and this Court's oft-stated requirement that redistricting courts constrained by federalism to defer where possible to state legislative choices. In addition to the relief sought in the Jurisdictional Statement, the Court should grant such other relief as is appropriate, in light of the impending conclusion of the primary runoff elections of April 14, 1992, which are being conducted under the invalid court-ordered interim Senate plan.[3]

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[3] The appeal is not moot. First, it presents an important matter that is capable of repetition yet evading review. *See, e.g., Moore v. Ogilvie*, 394 U.S. 814 (1969) (applying the doctrine in election setting). It is predictable that, in the absence of action by this

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

Of Counsel:
SAMUEL ISSACHAROFF
727 E. 26th Street
Austin, Texas 78705
(512) 471-5151

RENEA HICKS*
Special Assistant Attorney General
**Counsel of Record*

JAVIER P. GUAJARDO
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085

Attorneys for Appellants

March 13, 1992

Court, the district court will extend its inexplicably-limited preliminary injunction from the primary elections to the general elections; it is just as predictable that, if by then this appeal had been dismissed as moot, the state would promptly return to this Court, raising the same issues, but under the same severe time pressures which have attended this appeal. Second, the recent actions by the D.C. court in *Texas v. United States* and DOJ in its March 9th letter demonstrate that the appealed order has effects stretching beyond the primary, or even general, elections in 1992. These continuing effects, independent of the specific terms and reach of the appealed preliminary injunction, impart a concreteness which brings this appeal within the rule of non-mootness applied in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569-572 (1984), and outside the rule of *University of Texas v. Camenisch*, 451 U.S. 390 (1981). Here, unlike in *Camenisch*, expiration of the preliminary injunction would not restore the state to its pre-injunction status. *See Stotts*, 461 U.S. at 572 n.6.

APPENDIX

March 9, 1992

Honorable John Hannah, Jr.
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Senate Bill No. 1 (1992), which provides the redistricting plan for the Senate of the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on January 9, 1992; supplemental information was received on January 10, 1992.

We note that the submitted redistricting plan is substantively identical to the plan resulting from the settlement of state court litigation in October 1991. Quiroz v. Richards, No. C-4395-91F (332nd Jud. Dist. Ct., Hidalgo County, Tex.); Mena v. Richards, No. C-454-91-F (332nd Jud. Dist. Ct., Hidalgo County, Tex.). As you know, that plan received Section 5 preclearance on November 18, 1991. Since then, there have been significant new developments and submission of new information regarding that redistricting plan.

In December 1991, the Texas Supreme Court invalidated the settlement, thereby precluding its further implementation. Terrazas v. Ramirez, No. D-1817, 1991 WL 269035 (Tex. Dec. 17, 1991). One week later, the three-judge federal court in Terrazas v. Slagle, No. 91-CA-426 (W.D. Tex. Dec. 24, 1991) ("Terrazas"), adopted its own interim plan for Senate elections in 1992.

In January 1992, the legislature enacted the submitted Senate redistricting plan, and the state sought to supplant the Terrazas court plan with the enacted plan. The Terrazas court denied the request to stay implementation of the court's plan for the 1992 elections and, in its January 10, 1992 opinion ruled that the enacted plan could not be implemented, even if it were precleared under Section 5, because it "fails to satisfy the

Sec. 2 requirements of the Voting Rights Act," op. at 12-13.

We know that the state has appealed the relevant rulings in the Terrazas action, and that the appeal is pending in the United States Supreme Court. On several occasions, however, the Supreme Court has declined to stay the use of the Terrazas court's Senate redistricting plan for the 1992 election. Thus, at this time the extant orders in the Terrazas action preclude the implementation of the submitted redistricting plan for the 1992 election. Moreover, the finding that the submitted plan violates Section 2 would appear to preclude its use thereafter.

Under these circumstances, it is not clear that the state is entitled to invoke Section 5 to obtain either an administrative or judicial determination on the merits of the submitted plan. We recognize that the Supreme Court's decision on the state's appeal in Terrazas may determine whether the submitted plan is capable of implementation. But in view of the statutory time constraints, an administrative determination under Section 5 may not be deferred pending that ruling.

The Voting Rights Act requires that the submitting authority demonstrate that the proposed change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 520 (1973); see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, preclearance may not be obtained for a voting change that clearly violates Section 2 of the Voting Rights Act, as amended, 42 U.S.C. 1973; 28 C.F.R. 51.55 and 51.56.

In this situation, a federal district court has ruled that the submitted redistricting plan may not be used, in part, because the plan violates Section 2. That ruling, although challenged by the state, has not been vacated or reversed. Accordingly, I cannot conclude, as I must under the Voting Rights Act, that the plan meets the Act's preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the redistricting plan contained in Senate Bill No. 1 (1992).

Of course, as provided by Section 5, the state has the right to seek a declaratory judgment granting preclearance for the submitted redistricting plan from the United States District Court for the District of Columbia. As you are aware, the state has indicated it may do so in the context of the pending preclearance litigation concerning statewide redistricting. Texas v. United States, No. 91-2383 (D.D.C.).

The state also may request that the Attorney General reconsider the objection. In addition, reconsideration at the instance of the Attorney General may be appropriate "[w]here there appears to have been a substantial change in operative fact or relevant law." 28 C.F.R. 51.46(a). However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the submitted redistricting plan for the Texas Senate continues to be legally unenforceable under Section 5. Clark v. Roemer, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.46.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Steven H. Rosenbaum, Deputy Chief of the Voting Section at (202) 307-3143.

Sincerely,

/s/
John R. Dunne
Assistant Attorney General
Civil Rights Division